

**FILED**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA BARBARA

MAY 16 2005

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF SANTA BARBARA

10 SANTA MARIA DIVISION

11  
12 THE PEOPLE OF THE STATE OF CALIFORNIA, )  
13 )  
14 ) Plaintiff, )  
15 )  
16 ) v. )  
17 )  
18 ) MICHAEL JOE JACKSON, )  
19 )  
20 ) Defendant. )

No. 1133603

PLAINTIFF'S MEMORANDUM  
REGARDING THE EXTENT OF  
DEFENDANT'S WAIVER OF  
THE LAWYER-CLIENT  
PRIVILEGE WITH RESPECT  
TO MARK GERAGOS

DATE: TBA  
TIME: TBA  
DEPT: SM-2 (Melville)

21 A. Introduction:

22 Attorney Mark Geragos was called to testify on behalf of Defendant. Early on in his  
23 testimony the following colloquy was had:

24 "Q [By Mr. Mesereau]: And at some point, you were retained to represent Mr.  
25 Jackson, right?

26 "A: That's correct.

27 "Q: And how did that come about?

28 ////

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1 "THE WITNESS: Although I know you've told me out of court that there is a  
2 waiver, Your Honor, I have not seen nor heard it on the record, and I'm more  
3 comfortable if I have that first.

4 "THE COURT: Certainly.

5 "MR. MESEREAU: I can represent to the Court there is a waiver of the attorney-  
6 client privilege so Mr. Geragos can testify.

7 "THE COURT: You have a written waiver you'll provide him with after court  
8 today?

9 "MR. MESEREAU: We will do that, Your Honor, sure.

10 "THE COURT: Is that satisfactory?

11 "THE WITNESS: That is, Your Honor. Thank you."

12 (RT 5-13-05 p. 106:2 – 107:20.)

13 Direct examination of Mr. Geragos occupied just 42 pages of transcript. (RT 105:1  
14 – 146:14) Forty-four pages into cross-examination of Witness Geragos by Deputy District  
15 Attorney Zonen (and, we believe, after the 1:15 p.m. recess), the following transpired:

16 "Q. BY MR. ZONEN: Did you make any investigation into any of the allegations  
17 against Michael Jackson that occurred back in 1993 and prior to '93?

18 "MR. MESEREAU: Objection. Beyond the scope; no foundation; argumentative.

19 "THE COURT: Overruled. You may answer.

20 "THE WITNESS: Over the break I was given the written waiver, and the written  
21 waiver was up through –

22 "BAILIFF CORTEZ: Microphone, sir.

23 "THE WITNESS: The written waiver was up through the time of arrest. To answer  
24 that, I would have to go beyond that.

25 "THE COURT: I didn't understand that the waiver was limited.

26 "MR. ZONEN: Nor did I.

27 "MR. MESEREAU: Yes, Your Honor. If I didn't say that, I meant to. We were  
28 going to limit it until up to the time of Mr. Jackson's arrest.

1 "THE COURT: That's not what you informed all of us. Take the jury out, please."  
2 (RT 189:22 – 190:16.)

3 An effort was made to continue cross-examination within the limits allegedly  
4 imposed by the defendant's written waiver. A number of questions on further cross-  
5 examination were responded to by the witness's refusal to answer on grounds of the lawyer-  
6 client privilege. (See RT 211:5 – 212:23.) Ultimately the Court concluded, "I don't think this  
7 is productive to proceed this way." (RT 212:25-26.)

8 The Court directed counsel to submit points and authorities on the issue "what  
9 happens in the middle of testimony when the party who's asserted that they have given you a  
10 waiver on the record, a waiver of the attorney-client privilege, suddenly reveals in the writing  
11 that you don't have a complete waiver. And what are the remedies? What should I do?" (RT  
12 218:11-19.)

13 B. Plaintiff's Position, Summarized:

14 Plaintiff's necessarily hasty research has disclosed no authority to support a "partial"  
15 waiver of the attorney-client privilege. Given the effect any such limitation would have on the  
16 ability of the opponent to cross-examine the witness, the proposed limitation would have to be  
17 disclosed prior to the testimony of the witness. In this case, Mr. Geragos's assertion of a  
18 privilege that belongs to his client – articulated by Mr. Geragos out of a concern for his own  
19 "exposure" (RT 193:7-9) – came after direct examination was completed and only after cross-  
20 examination threatened to disclose prejudicial information. Assuming Mr. Geragos could  
21 assert a "partial" privilege on behalf of his former client, that assertion came too late.

22 C. Mr. Geragos's Obligation To Testify:

23 "Except as otherwise provided by statute: . . . (b) No person has a privilege to refuse to  
24 disclose any matter or to refuse to produce any writing, object or other thing." (Evid. Code, §  
25 911 [in part].)

26 D. The Purported "Limited Waiver":

27 The waiver document in question is type-written on letterhead stationery of "CMRY,"  
28 the law firm of lead counsel. The typewritten date "May 13, 2005" appears at the top of the

1 document. The body of the waiver reads as follows: "Dear Mark: [¶] I hereby authorize you  
2 and your current law firm, Geragos & Geragos (collectively 'you' or 'your'), to make full  
3 disclosure, including your work product, of all communications you had with me up until Mr.  
4 Jackson's arrest in December, 2003. [¶] The primary purpose of this limited waiver is to  
5 permit you to testify freely, voluntarily, and openly – without violating any of your ethical  
6 duties owed to me – to all questions posed to you during your testimony in the above-  
7 referenced criminal trial currently pending. [¶] This waiver is being granted upon the advice  
8 of my legal counsel, Thomas A Mesereau, Jr. [¶] Very truly yours. /s/ Michael Jackson.  
9 [Typed] Michael J. Jackson." "APPROVED AS TO FORM AND CONTENT: /s/ Thomas  
10 Mesereau/ sy, [typed] "Thomas A. Mesereau, Jr."

11 The form of the attorney's counter-signature – "Thomas Mesereau/sy" – indicates  
12 that it actually was signed by Susan Yu.

13 One may reasonably infer that the document was typed on the date shown, and at a time  
14 when Mr. Mesereau himself was not available to counter-sign the waiver.

15 E. The Lawyer Client Privilege:

16 Evidence Code section 954 declares that "Subject to Section 912 and except as  
17 otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to  
18 disclose, and to prevent another from disclosing, a confidential communication between client  
19 and lawyer if the privilege is claimed by: (a) The holder of the privilege; (b) A person who is  
20 authorized to claim the privilege by the holder of the privilege; or (c) The person who was the  
21 lawyer at the time of the confidential communication, but such person may not claim the  
22 privilege if . . . he is otherwise instructed by a person authorized to permit disclosure."

23 The privilege encompasses communications from the client to the lawyer, and from the  
24 lawyer to the client, which were intended to be confidential. It may also cover any information  
25 which the attorney or his investigator may acquire as a direct result of the privileged  
26 communication itself. (*People v. Meredith* (1981) 29 Cal.3d 682, 693 [observations of  
27 investigator "made as a consequence of protected communications"], and see *ibid.*, fn. 1.)  
28

1 The attorney-client privilege, like other evidentiary privileges,” should be narrowly  
2 construed because they prevent the admission of relevant and otherwise admissible evidence.”  
3 (*McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1236.)

4 The client of a lawyer is the holder of the privilege. (Evid. Code, § 953.)

5 F. Waiver of Attorney-Client Privilege:

6 “Consent to disclosure is manifested by any statement or other conduct of the holder  
7 of the privilege indicating consent to the disclosure, including failure to claim the privilege in  
8 any proceeding in which the holder has the legal standing and opportunity to claim the  
9 privilege.” (Evid. Code, § 912, subd. (a) [in part].) The attorney-client privilege may be  
10 waived by the client when his opponent calls his former lawyer as a witness, who is then cross-  
11 examined by the client’s current counsel concerning matters that would otherwise come within  
12 the privilege. (*Winegar v. Gray* (1962) 204 Cal.App.2d 303, 310.) The same rule would  
13 appear to apply where the client’s current lawyer calls his former lawyer as a witness, offers a  
14 general waiver of the attorney-client privilege on his client’s behalf, and then asks the witness  
15 to testify to matters concerning which effective cross-examination requires disclosure of  
16 privileged information.

17 Plaintiff’s own, necessarily hasty research has disclosed no authority for a “limited  
18 waiver” of the privilege.

19 Waiver of the privilege may be found in the act of calling his present or former lawyer  
20 to testify on his behalf. (See *People v. Dubrin* (1965) 232 Cal.App.2d 674, 680 [“If the client  
21 calls his attorney as a witness to testify to matters that the attorney could only have learned  
22 through the attorney-client relationship he waives the privilege granted by section 1881 of the  
23 Code of Civil Procedure”].) A waiver may be found simply in the client’s failure to object to  
24 testimonial evidence offered against him or her at trial. (*Scottsdale Ins. Co. v. Superior Court*  
25 (1997) 59 Cal.App.4th 263, 274 [failure to include objections to interrogatories expressly  
26 based on attorney-client privilege waives the objection]; *Cope v. Cope* (1964) 230 Cal.App.2d  
27 218, 235 [declarations offered in evidence in divorce proceeding]; *Clyne v. Brock* (1947) 82  
28 Cal.App.2d 958, 965.)

1 The party claiming the attorney-client privilege has the burden of establishing that  
2 particular matters were privileged. "The party claiming the privilege carries the burden of  
3 showing that the evidence which it seeks to suppress is within the terms of the statute." (*D.I.*  
4 *Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729.)

5 G. Plaintiff's View Of The Facts:

6 The written waiver, executed on Friday, May 13th, does indeed limit the dates within  
7 which protection for communications otherwise fairly within the scope of the lawyer-client  
8 privilege could otherwise be asserted. It's tardy production raises more questions than it  
9 settles.

10 An issue of fact is presented as to when the written waiver was typed and when it  
11 was executed by defendant. As noted above, Mr. Geragos stated at the outset of his testimony  
12 that though someone (the Court itself or defense counsel) "told me out of court that there is a  
13 waiver, Your Honor, I have not seen nor heard it on the record . . .," and Mr. Mesereau  
14 responded merely by "represent[ing] to the court there is a waiver of the attorney-client  
15 privilege so Mr. Geragos can testify," a copy of which, he affirmed, would be given to Mr.  
16 Geragos "after court today." Sometime thereafter, Mr. Geragos informed the Court that "Over  
17 the break I was given the written waiver," which he observed was limited in its scope.

18 Plaintiff respectfully suggests that it is reasonable to infer from the foregoing that  
19 the written, limited waiver that ultimately surfaced was not in defense counsel's possession  
20 when Mr. Geragos commenced his testimony. Were it otherwise, counsel likely would have  
21 produced and filed it as soon as Mr. Geragos expressed his desire to have the waiver made a  
22 matter of record. The Court may wish to have Attorney Mesereau and Attorney Yu make a  
23 specific representation, as officers of the court, concerning the date and time of the creation  
24 and execution of the waiver form shown to Mr. Geragos "over the break."

25 Mr. Mesereau's assurance to the court, in the presence of his client, that "there is a  
26 waiver of the attorney-client privilege so Mr. Geragos can testify," should be given effect as  
27 the unrestricted, unconditional waiver it purported to be. That is surely the case if defendant  
28

1 himself had not executed the written waiver prior to his counsel's unqualified representation of  
2 the fact of a "waiver" to the court.

3

4 H. "Withdrawal" Of The Unqualified Waiver

5 To be sure, the holder of a privilege may withdraw a waiver of that privilege  
6 (whether a qualified or unqualified waiver) before others act in reliance on it.

7 In this case, all hands (including, apparently, Mr. Geragos himself) proceeded on  
8 the assumption that the waiver asserted by defendant through his counsel was unqualified in its  
9 scope, until cross-examination touched a nerve.

10 If the written waiver was not executed until direct examination of Mr. Geragos by  
11 defense counsel had been completed, it plainly comes too late to limit cross-examination.  
12 Once the jury has seen the horse gallop out of the barn, it is too late to put the animal back in  
13 its stall and ask the jury to pretend it hadn't seen the horse to begin with. The prosecution  
14 clearly was entitled to vigorously and closely cross-examine the witness concerning the subject  
15 matter of his testimony on direct examination, not only to test the factual and logical limits of  
16 his observations and conclusions, but to test his bias and credibility as well.

17 Even if the written waiver was prepared in advance of need and was deliberately  
18 kept a secret until cross-examination cut too close to the knuckle and made its tardy production  
19 seem prudent simply as a matter of tactics, it came too late. The defense had concluded its  
20 direct examination of Mr. Geragos long before the supposed limitations of the attorney-client  
21 waiver were discussed. Plaintiff was entitled – nay, duty-bound – to engage in cross-  
22 examination reasonably calculated to illuminate the credibility of the witness and to afford the  
23 jury a three-dimensional appreciation of the facts he testified to on direct. "Our courts are not  
24 gambling halls but forums for the discovery of the truth," as the late Justice Peters famously  
25 observed in another context. (*People v. St. Martin* (1970) 1 Cal.3d 524, 533.)

26

27 I. Proposed Remedies:

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1 The Court should deny the defendant's late assertion of a "limited waiver". There is  
2 either a full waiver or no waiver. There is no authority to support the concept of a limited  
3 waiver without the agreement of the parties and certainly under these facts where both direct  
4 and cross examination were conducted under a then existing waiver without limitations.  
5 If the court finds the initial waiver to be an unconditional waiver and the defendant insists upon  
6 only asserting his last minute conditional waiver the court should consider the attorney client  
7 privilege asserted in its entirety and strike the Mr. Geragos' testimony in its entirety.

8 The Court should consider other sanctions, and the appropriateness of an  
9 amelioratory jury instruction, if it finds that Mr. Mesereau deliberately misrepresented the  
10 apparently unrestricted status of the waiver he announced on behalf of his client before he  
11 commenced his direct examination and then tried to close the door he had opened.

12 DATED: May 16, 2005

13 THOMAS W. SNEDDON, JR.  
14 District Attorney

15 By: R. J. Franklin  
16 Gerald McC. Franklin, Senior Deputy District Attorney

17 Attorneys for Plaintiff  
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2  
3 **PROOF OF SERVICE**

4 STATE OF CALIFORNIA )  
5 ) SS  
6 COUNTY OF SANTA BARBARA )

7 I am a citizen of the United States and a resident of the County aforesaid; I am over the  
8 age of eighteen years and I am not a party to the within-entitled action. My business address  
9 is: District Attorney's Office; Courthouse; 1112 Santa Barbara Street, Santa Barbara, California  
10 93101.

11 On May \_\_\_\_, 2005, I served the within PLAINTIFF'S MEMORANDUM  
12 REGARDING THE EXTENT OF DEFENDANT'S WAIVER OF THE LAWYER-CLIENT  
13 PRIVILEGE WITH RESPECT TO MARK GERAGOS on Defendant, by THOMAS A.  
14 MESEREAU, JR. and ROBERT SANGER, his counsel in this matter, by personally delivering  
15 a true copy thereof to defense counsel in open court. I declare under penalty of perjury that the  
16 foregoing is true and correct.

17 Executed at Santa Maria, California on this <sup>TH</sup> 16 day of May, 2005.

18 Thomas A. Mesereau  
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